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No. 00-640

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES MCGUIRE, LORRAINE MCGUIRE and MARITAL CHILD MCGUIRE,

Petitioners,

v.

ROCK COUNTY, ROCK COUNTY BOARD OF SUPERVISORS, VILLAGE OF BROOKLYN, VILLAGE OF BROOKLYN POLICE DEPARTMENT, DEAN A. CORNFORD, TERRY G. MAYBEE, THOMAS A. SCHROEDER, CRAIG KNUTSON, CHARLES A. HOLZNECHT, HOWARD L. ERICKSON, JAMES A. DILLEY, CURTIS N. FELL, FRANK D. DUBANOWICH, THOMAS W. GEHL, ARTHUR R. LEFEBER, WILLIAM ROBERTS, DAVID JON O'LEARY, THOMAS G. WHITE, STEPHEN CARPENTER, GARY L. LUHMAN, RICHARD T. WERNER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The McGuires' "Fair Statement of Undisputed and Stipulated Fact" (pp. 1-9 of Petition for Writ of Certiorari) is anything but "fair." Their Petition misstates or ignores critical facts found by the lower courts, as well as the District Court jury. The facts, supported by the record herein, reveal the following.

This case is a *pro se* action involving a Complaint against the Rock County Sheriff (Erickson), a Lieutenant in the Sheriff's Department (Dilley), the Commander of the Law Enforcement Division of the Rock County Sheriff's Department (LeFeber), a patrol Deputy Sheriff (Fell), the head of the Detective Bureau of the Rock County Sheriff's Department (Gehl), a Deputy Sheriff serving as Court Officer (Dubanowich), the Rock County Corporation Counsel (Schroeder), a Rock County Court Commissioner (Holznecht), the Rock County Administrator (Knutson), the Chair of the Rock County Board of Supervisors (Maybee), the Chair of the Rock County Board's Public Safety and Justice Committee (Cornford), the Rock County Board of Supervisors, and the County of Rock (hereinafter collectively referred to as "County defendants"). The Complaint was filed by James McGuire, Lorraine McGuire and their minor marital child, who reside in the Town of Brooklyn, County of Green, State of Wisconsin (hereinafter collectively referred to as "the McGuires").

The Complaint alleged that the McGuires' constitutional rights were violated when Fell entered the McGuire residence on December 31, 1996, used unnecessary force and arrested James McGuire, as well as by taking James

McGuire to the Rock County Jail and during the subsequent criminal prosecution. The McGuires' Complaint was also filed against a Village of Brooklyn Police Officer (Roberts), the Village of Brooklyn Police Department and the Village of Brooklyn (hereinafter collectively referred to as "Village defendants"), as well as against a Circuit Court Judge (Werner), the Rock County District Attorney (O'Leary), the Green County District Attorney (Luhman) and two Rock County Assistant District Attorneys (White and Carpenter) (hereinafter collectively referred to as "State defendants").

Fell was on patrol duty during the evening hours of December 31, 1996, New Year's Eve. The Green County Sheriff's Department requested a response by the Rock County Sheriff's Department to an auto accident on County Trunk Highway T (CTH T). CTH T forms a boundary between Rock County and Green County. At about 9:36 p.m. on that date, Fell responded to the scene and found a vehicle in the ditch on the Rock County side of CTH T with an empty child's car seat in the back seat of the vehicle. In checking with dispatch, Fell discovered that the owner of the vehicle, James McGuire, lived nearby. Needing to continue his investigation and concerned for the safety and welfare of any occupants of the vehicle, Fell proceeded to the McGuire residence which was on the Green County side of CTH T, less than 1/4 mile from the Rock County line.

Fell was in uniform and easily identifiable as a Rock County Deputy Sheriff. Lorraine McGuire consented to Deputy Fell's entrance into the McGuire residence. Upon entrance into the residence, Fell discovered James McGuire on the floor. Mrs. McGuire informed Fell that

her husband was intoxicated, had been throwing up earlier and passed out on the floor. Although initially unable to awaken Mr. McGuire, Deputy Fell was ultimately able to speak with him. Mr. McGuire stated that he wanted to hold his baby daughter. Mrs. McGuire, holding the child, retreated from Mr. McGuire, telling him that he was intoxicated and in no condition to hold the baby. Because Mr. McGuire appeared intoxicated and was in no shape to hold a baby safely, Deputy Fell intervened to prevent Mr. McGuire from holding the child. Mr. McGuire fought Fell's attempt to restrain him, so Fell arrested him and charged him with resisting an officer.

Officer Roberts had also been dispatched to the accident scene on CTH T. While waiting at the scene, Roberts was requested to go to the McGuire residence to check on the welfare of Deputy Fell. Upon his arrival, Roberts was advised that Fell had arrested James McGuire for resisting an officer.

Fell telephoned Lt. Dilley who advised him to bring James McGuire to the Rock County Jail for booking and release. Mr. McGuire was transported to the Rock County Jail where he was detained until later in the morning of January 1, 1997. Mr. McGuire was also issued a citation for driving too fast for conditions.

On February 3, 1997, Dubanowich signed a criminal complaint against James McGuire for resisting an officer in Rock County Case No. 97-CM-222J. The criminal complaint erroneously stated that the offense had occurred in Rock County. James McGuire appeared before Commissioner Holznecht on February 3, 1997 and probable cause was found that Mr. McGuire had committed the offense

of resisting an officer. McGuire pled not guilty. On June 4, 1997, Judge Werner dismissed the criminal complaint ruling that it should have been issued by the Green County District Attorney. White and Carpenter made court appearances on behalf of the State in the criminal proceedings against James McGuire.

Lorraine McGuire complained about the handling of this incident to Luhman, the Rock County Sheriff's Department, Maybee and Cornford. Mrs. McGuire was not satisfied with the efforts of Erickson, LeFeber and Gehl in investigating her complaint. Schroeder responded to Mrs. McGuire on behalf of Maybee and Cornford.

The McGuires began this litigation with the filing of a Summons and Complaint on or about June 12, 1998. An Amended Summons and Complaint was filed on or about July 6, 1998.

A Motion to Dismiss State defendants O'Leary, White, Carpenter and Luhman was filed on July 15, 1998. A Motion to Dismiss State defendant Werner was filed on July 20, 1998. An Order granting both those motions and dismissing State defendants was entered by the United States District Court for the Western District of Wisconsin (Hon. John C. Shabaz) on September 8, 1998.

On October 5, 1998, County defendants filed a Motion for Summary Judgment which, except for Deputy Fell, was granted in an Order entered November 9, 1998. Village defendants were also dismissed on a separate Motion for Summary Judgment.

A trial to a jury was held on November 23, and 24, 1998 on whether Fell entered the McGuire residence on

December 31, 1996 without consent and on whether Fell used excessive force during the course of the arrest of James McGuire on that same date. Both issues were decided favorably to Deputy Fell. In an Order dated November 25, 1998 the District Court ordered judgment to be entered in favor of all defendants with prejudice and with costs and reasonable attorney's fees.

The McGuires proceeded with an appeal to the United States Court of Appeals for the Seventh Circuit. In a decision issued April 12, 2000 (Appendix A to Petition for Writ of Certiorari) the judgment of the District Court was affirmed.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE PETITION MISSTATES OR IGNORES CRITICAL FACTS DETERMINED IN THE LOWER COURTS.

A. Mrs. McGuire consented to Deputy Fell's entry into the McGuire residence on December 31, 1996.

Of the 12 issues set forth by the McGuires in their Petition for Writ of Certiorari at least seven of them (1, 2, 5, 6, first 7, 8 and 9) revolve entirely around the McGuires' characterization of Fell's entry into their residence as a warrantless, nonexigent entry. The McGuires then spend the majority of their argument citing case law relative to such warrantless, nonexigent entries. Such

characterization of the issues and the argument are irrelevant as it totally ignores the jury's determination that Mrs. McGuire consented to Deputy Fell's entry.

> Generally, the jury and not the appellate court determines the facts of the case and the appellate court cannot invade the province of the jury in this respect or substitute its judgment of the facts for that of the jury.

5 C.J.S. § 784 (1993 ed.). This was clearly recognized by the 7th Circuit Court of Appeals in its determination that "we must present the facts in the light most favorable to the verdict." (Appendix A to Petition for Writ of Certiorari).

The jury was able to reach its determination on this and another factual issue within 15 minutes after hearing trial testimony and argument over a two day period. Insight into the McGuires' prosecution of this appeal can be garnered from the Order entered by the United States District Court for the Western District of Wisconsin (Hon. John C. Shabaz) on November 25, 1998 which contains the following extraordinary statement:

> Upon receipt of the special verdict in the above entitled matter the Court determined that the plaintiffs' claims were based on their perjured testimony as well as the fraudulent strategy which they continued to devise and pursue throughout trial. Not only were their claims frivolous and less than substantial but were based on false statements presented during the pre-trial proceedings and untruthful testimony provided to the jury during trial.

(Appendix C to Petition for Writ of Certiorari).

The McGuires' attempt to seize on Fell's lack of any specific memory concerning the outside doorbell is an effort to create a coercive situation from which voluntary consent could not be given. This attempt is made with the McGuires' version of out-of-context snippets of testimony, in the absence of an official transcript. From Fell's lack of memory the McGuires argue that Fell ignored the doorbell, stormed across their enclosed porch waking Mrs. McGuire and confronted her at the kitchen door thus "depriv[ing] her of ability to give informed consent. . . . " (page 14 of Petition for Writ of Certiorari).

It is instructive to note that the record below (Docket Entry #89) contains Mrs. McGuire's Affidavit, dated October 8, 1998 which, contrary to the argument in the Petition, states at paragraph 8:

> On December 31, 1996 I was awakened by the sound of our dog barking and then the sound of a doorbell ringing. . . . I looked out through a small window of Door #2, from inside my kitchen, and saw a man's head outside Door #1, with a distance of at least 13 feet between myself and the darkened outdoors outside the door where he was standing. . . . Because I only saw Curtis Fell's head (he was wearing no hat), he had to have been standing on one of the lower cement steps or at the bottom of the steps on the sidewalk just before the steps. . . . Except for his continuing to ring the doorbell, I couldn't hear anything else due to my dog jumping about and barking. . . .

The jury heard the testimony in this case and determined the credibility of the various witnesses. The jury was explicitly instructed that in determining "whether consent exists [to Fell's entry into the McGuire residence]

you should examine all the surrounding circumstances." (R-App.1) Based on the testimony, its credibility assessments and the Judge's instructions the jury concluded that Mrs. McGuire consented to Deputy Fell's entry into the McGuire residence on December 31, 1996.

B. Deputy Fell did not use excessive force during the arrest of James McGuire on December 31, 1996.

As with the issue of consent, the McGuires offer no basis to review the jury's determination relative to lack of excessive force other than their disagreement with it. Again, that determination is within the province of the jury. Again, based on the testimony, its credibility assessments and the Judge's instructions (R-App. 2) the jury concluded that Deputy Fell did not use excessive force during the arrest of James McGuire on December 31, 1996.

II. THE PETITION ARGUES THE MISAPPLICATION OF THE LAW BY THE LOWER COURTS.

A. Wisconsin's "mutual assistance law" provided authorization for Deputy Fell's arrest of James McGuire on December 31, 1996.

Section 66.305(1), Wis. Stats., provides, in pertinent part, as follows:

> Upon request of any law enforcement agency, including county law enforcement agencies as provided in s. 59.28(2), the law enforcement personnel of any other law enforcement

> agency may assist the requesting agency within the latter's jurisdiction, notwithstanding any other jurisdictional provision.

Section 59.28(2), Wis. Stats., states that "County law enforcement agencies may request the assistance of law enforcement personnel or may assist other law enforcement agencies as provided is ss. 66.305 and 66.315."

Deputy Fell was acting pursuant to § 66.305(1), Wis. Stats., when he went into Green County to investigate the accident. Having responded to such a request, Deputy Fell had the authority, pursuant to § 66.305(1) to make an arrest for a crime committed in his presence. *United States v. Mattes*, 687 F.2d 1039, 1041 (7th Cir. 1982). The District Court's finding in this regard was correct.

B. Summary judgment was appropriately ordered by the District Court for all County defendants with the exception of Deputy Fell.

While it is unclear whether the McGuires are challenging the granting of the Motion for Summary Judgment as to County defendants (except Fell), it is apparent that any such argument would be based on the McGuires' position that the District Court misapplied a properly stated rule of law. The Court of Appeals recognized the McGuires offered no supporting argument in this regard. (Appendix A to Petition for Writ of Certiorari).

It is submitted that the properly stated rule of law was applied correctly and summary judgment was appropriately granted to County defendants (except Fell).

III. THE PRIMARY BASIS FOR THE MCGUIRES' PETITION IS THAT THE LOWER COURTS MADE ERRONEOUS FACTUAL FINDINGS AND MISAPPLIED THE LAW.

Rule 10 of the Rules of the Supreme Court of the United States concludes with the statement: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law." According to Justice Holmes, the Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This policy is applied with "particular vigor when the district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J., Dissenting). See also *NLRB v. Hendricks County Rural Electric Membership Corporation*, 454 U.S. 170, 176 (1981).

Under this standard, the McGuires' Petition should be denied.

IV. ISSUE 10 SET FORTH IN THE PETITION RELATIVE TO FAILURE TO PROVIDE MIRANDA RIGHTS IS NOT PROPERLY BEFORE THIS COURT.

Question 10, as set forth in the McGuires' Petition for Writ of Certiorari asks whether a failure to inform Petitioners of their Miranda rights violated their 5th Amendment rights. As this issue was not raised in the Court of Appeals, it is not properly before this Court.

V. THE LACK OF A TRANSCRIPT OF THE DISTRICT COURT PROCEEDINGS PROHIBITS REVIEW

Rule 10(b)(2) of the Federal Rules of Appellate Procedure states:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to the finding or conclusion.

As is the case here, transcripts of certain proceedings are necessary to a resolution of the issues on appeal. "It is obvious that an appellate court has no alternative but to dismiss an appeal if the absence of a transcript precludes meaningful review." *Fisher v. Krajewski*, 873 F.2d 1057, 1061 (7th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990). See also *Woods v. Thieret*, 5 F.3d 244, 245 (7th Cir. 1993); *Birchler v. Gehl Company*, 88 F.3d 518, 520 (7th Cir. 1996).

CONCLUSION

For the forgoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 21st day of November, 2000.

Respectfully submitted,

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FOURTH AMENDMENT

Plaintiffs assert that defendant Curtis Fell deprived them of the right to be free from unreasonable searches as guaranteed under the Fourth Amendment to the Constitution of the United States. The entry of defendant Curtis Fell into plaintiffs' home did not violate their Fourth Amendment rights if it was pursuant to plaintiff Lorraine McGuire's consent.

Consent may be express or implied. Express consent exists when a person expressly authorizes or invites another into his or her home. Implied consent exists when a person by his or her words, gestures or conduct consents by implication to another person's entry into the home. To determine whether consent exists you should examine all the surrounding circumstances.

FOURTH AMENDMENT – EXCESSIVE FORCE

Plaintiff James McGuire claims that defendant Curtis Fell deprived him of the right to be free from unreasonable seizures as guaranteed under the Fourth Amendment to the Constitution of the United States and must prove by the preponderance of the evidence that defendant Curtis Fell used excessive force during the course of his arrest.

In making a lawful arrest a police officer has the right to use such force as is reasonably necessary under the circumstances of each particular case to effect the arrest, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others and whether he is actively resisting arrest or attempting to evade arrest by flight.

Whether or not force used in making an arrest was excessive is an issue to be determined by you in light of all of the surrounding circumstances. The defendant officer has the lawful authority to use such force in making the arrest as reasonable police officers would believe necessary.

This reasonableness inquiry is an objective one; the question is whether the officer's actions are objectively reasonable in light of the facts and circumstance confronting them, without regard to their underlying intent or motivation.